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Date: June 15, 2000

Case Nos.: 1998-LHC-2993
1999-LHC-110

OWCP Nos.: 07-134219
07-140253

In the Matter of

DAVID SMOTHERS

Claimant

v.

BUNGE CORPORATION

Employer

and

PACIFIC EMPLOYERS' INSURANCE CO.

Carrier

APPEARANCES:

MARK E. JOHNSON, ESQ.

For the Claimant

KATHLEEN K. CHARVET, ESQ.

For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by David Smothers (Claimant) against Bunge Corporation (Employer) and Pacific Employers' Insurance Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on November 18, 1999, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 23 exhibits while Employer/Carrier proffered 30 exhibits which were admitted into evidence along with two Joint Exhibits. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer/Carrier on February 2, 2000 and February 1, 2000, respectively. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

1994 Right Shoulder Injury

At the commencement of the hearing, the parties stipulated (JX-1a), and I find:

1. That Claimant was injured on April 27, 1994.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That Employer was notified of the accident/injury on May 2, 1994.

5. That Employer/Carrier filed a Notice of Controversion on

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

April 23, 1996.

6. That an informal conference before the District Director was held on September 15, 1998.

7. That Claimant received temporary total disability benefits from August 11, 1994 through September 29, 1994 at a compensation rate of $382.57.

8. That Claimant's average weekly wage at the time of injury was $573.55.

9. That $21,488.13 in medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

1996 Left Shoulder Injury

The parties also stipulated (JX-1b), and I find:

1. That Claimant was injured on March 1, 1996.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That Employer was notified of the accident/injury on March 1, 1996.

5. That Employer/Carrier filed Notices of Controversion on July 3, 1996, November 19, 1996 and January 31, 1997.

6. That an informal conference before the District Director was held on September 15, 1998.

7. That Claimant received temporary total disability benefits from June 27, 1996 through February 12, 1997, at a compensation rate of $404.61, and permanent partial disability benefits from February 12, 1997 and continuing through present, at a compensation rate of $230.21.

8. That Claimant's average weekly wage at the time of injury was $606.92.

9. That $16,605.11 in medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1994 Right Shoulder Injury:

1. Work-relatedness of cervical injury to 1994 shoulder injury.

2. Nature and extent of disability, if any.

3. Date of maximum medical improvement.

4. Suitable alternative employment.

5. Authorization for medical treatment by Dr. Hamsa and surgery for cervical condition.

6. Whether Employer/Carrier are entitled to Section 8(f) relief.

1996 Left Shoulder Injury:

1. Work-relatedness of cervical injury to 1996 shoulder injury.

2. Nature and extent of disability, if any.

3. Date of maximum medical improvement.

4. Suitable alternative employment.

5. Authorization for medical treatment by Dr. Hamsa and surgery for cervical condition.

6. Whether Employer/Carrier are entitled to Section 8(f) relief.

III. STATEMENT OF THE CASE

Testimonial Evidence

Claimant

Claimant, who currently resides in Kenner, Louisiana, is a widower with three children. (Tr. 34). He graduated from Alcee Fortier High School in New Orleans and obtained a welding degree from Jefferson Vocational Tech. Id. In July 1973, Claimant began

working for Employer as a laborer. (Tr. 35). He previously worked aboard barges and as a millwright and eventually became a master mechanic in 1985 or 1986. (Tr. 35-37).

On April 27, 1994, Claimant was working on a pipe in a duct system when he injured his right shoulder. (Tr. 38). On the same day, he reported the injury to his supervisor, Danny Childress, completed an accident report and went to Employer's physician, Dr. Tamimie, who diagnosed Claimant with a torn rotator cuff. Id. Claimant explained that the pain he experienced was restricted to the top part of his shoulder. (Tr. 40). Dr. Tamimie released Claimant to return to work in the shop until surgery. (Tr. 42). While working in the shop, his duties consisted of cleaning the warehouse, sweeping or "writing stencils." Id. He claimed that he continued to experience pain while performing this modified work. Id.

Claimant began treating with Dr. Steiner about two or three weeks after Dr. Tamimie's treatment, at which time Claimant's arm was placed in a sling. (Tr. 43). On August 11, 1994, Claimant underwent a rotator cuff repair surgery. About two months following surgery, Claimant returned to light duty work in the warehouse. (Tr. 45). He performed light duty work for about six months, but continued to complain of pain and "noise." (Tr. 45-46). Because Claimant's shoulder "didn't feel right," he sought treatment by Dr. Hamsa. (Tr. 46).

Claimant testified that he suffered a similar rotator cuff tear in 1985 during a non-work-related accident from which he recovered completely. (Tr. 46-47). After the 1985 injury, he returned to work with no restrictions with Employer. (Tr. 47).

With respect to the 1994 torn rotator cuff injury, Claimant sought treatment with Dr. Hamsa because he felt that Dr. Steiner was not addressing his concerns regarding the continuing complaints of pain. (Tr. 48). It should be noted that Claimant did not make any cervical complaints until June 21, 1995. He testified that Dr. Steiner restricted him from overhead activities with his right arm. Id. Claimant maintained that Employer did not adhere to Dr. Steiner's restrictions when he returned to work. (Tr. 48-49). He claimed that he was assigned to hang or change "socks," which involved overhead reaching and caused him pain in the right shoulder. (Tr. 49). Claimant testified that Ron Movern, his supervisor, told him not to engage in activities which caused him pain, but Claimant performed the work anyway. (Tr. 50). He reported to Dr. Steiner that Employer continued to assign overhead work and Claimant was told that Dr. Steiner would call Employer and ask Employer to adhere to the restriction. (Tr. 51).

Following surgery, Claimant attended physical therapy about once or twice a week while working light duty. (Tr. 53). Claimant testified that the last time he treated with Dr. Steiner, he was assigned a 10% impairment rating and was told to not perform any overhead work. Id.

Because Claimant was still experiencing pain, he sought treatment with Dr. Hamsa, who performed an MRI. (Tr. 54). Claimant learned that the MRI revealed ruptured discs in his neck which Dr. Hamsa attributed to the right shoulder injury. (Tr. 55). Prior to the accident, Claimant did not suffer from any neck pain. Id.

Claimant also testified that in 1996 while removing a ladder, he was hit by a pipe on his left shoulder. (Tr. 130). He reported this injury to his supervisor, Frank Harris, but did not seek immediate medical attention. (Tr. 131). He eventually saw Dr. Tamimie, who opined Claimant sustained a torn rotator cuff. Id. Claimant underwent surgery by Dr. Hamsa to repair the left shoulder injury. Id. Claimant has not returned to work since July 1996. (Tr. 132). He testified Employer did not provide him with any alternate sedentary or light work after the second work injury. Id. At present, Claimant does not feel that he can return to work due to continuing pain in his neck and right shoulder. Id.

On cross-examination, Claimant testified that his attorney never informed him that alternate job positions had been identified for him, nor did his attorney refer him to the Department of Labor for purposes of finding a job. (Tr. 133). Additionally, Claimant never contacted the Department of Labor vocational department concerning a request for job placement. Id.

With regards to beginning treatment with Dr. Hamsa, Claimant claimed he asked union personnel, not Employer's management, if he could obtain a second medical opinion. (Tr. 134-135). He never obtained authorization from Employer to treat with Dr. Hamsa. Id. Nor did Claimant obtain authorization from the Department of Labor to change physicians. Id.

Claimant re-affirmed that his 1985 non-work-related shoulder injury was repaired with surgery and that between 1985 and 1994, he suffered no further right shoulder problems until the 1994 work accident. (Tr. 136). He did not recall complaining of a shoulder injury in 1990. (Tr. 136-137). After the 1994 injury and resultant surgery, Claimant returned to work and told his supervisors that he had been restricted from performing any work involving his right shoulder. (Tr. 137). He was fully aware that he was not to perform any work involving his right upper extremity,

in particular, overhead reaching. (Tr. 138-139). Claimant did not file a formal grievance or complaint with the union concerning the work he was asked to perform in excess of his limitations. (Tr. 139). He has not applied for any other job positions since he last worked for Employer in July 1996. Id.

On re-direct examination, Claimant testified it was his understanding that in 1994, when he was restricted by Dr. Steiner from overhead reaching, there was no distinction between using his right or left extremity. (Tr. 141).

Clair N. Jones

Mr. Jones, who has worked for Employer for 21 years, is currently the administrative manager. (Tr. 143-144). His duties include all administrative functions at the facility, in particular, handling employee's injuries and workers' compensation claims. (Tr. 144). He was aware that Claimant sustained a non-occupational shoulder injury in 1985 and a work-related shoulder injury in 1994. (Tr. 146). Claimant's personnel records also indicate Claimant had a right shoulder injury in 1990 which was treated by Dr. Tamimie. (Tr. 147).

Mr. Jones explained that after Claimant was injured in 1994, he was referred to Dr. Tamimie, who in turn referred him to Dr. Cazale for an orthopaedic consult. (Tr. 149). He believed Claimant was dissatisfied with Dr. Cazale's treatment and subsequently began treating with Dr. Steiner. Id. Mr. Jones understood Claimant to be restricted from performing any overhead work involving the right arm. (Tr. 150). He stated that Employer received medical reports from Dr. Steiner indicating the permanent restrictions which were to be placed on Claimant. Id. He claimed Claimant's supervisors were informed and that Claimant was instructed to not perform any activity outside the given restrictions. (Tr. 151). Mr. Jones testified that Claimant's job classification from the 1994 injury through 1996 injury was light duty. Id. He also testified that Claimant did not request to change physicians from Dr. Steiner to Dr. Hamsa. Id.

With respect to union matters, Mr. Jones was never advised that Claimant filed a grievance or complaint concerning being asked to work beyond his restrictions or limitations. (Tr. 152). Additionally, he testified Claimant did not seek authorization from the Department of Labor to change physicians. Id. Nor did Claimant's attorney contact Mr. Jones or any other representative of Employer to seek authorization for change of physicians. (Tr. 153).

In response to the undersigned's questioning, Mr. Jones testified that changing dusts socks involved overhead reaching and thus, would be in excess of Claimant's physical limitations. (Tr. 156).

Tony R. Murphy

Mr. Murphy, who has been employed as a millwright with Employer for about 23 years, was deposed by the parties on June 28, 1999 in St. Rose, Louisiana. (CX-14). He explained that his duties involved servicing and maintaining mechanical equipment. (CX-14, pp. 7-8). He testified that he worked with Claimant for approximately 15 years. (CX-14, p. 9). He and Claimant were members of the same union, in which Mr. Murphy served as vice-chairman from about 1978 through the early 1990's. (CX-14, pp. 10-11).

Following the 1994 injury, Mr. Murphy did not discuss with Claimant his return to modified duty. (CX-14, p. 15). Additionally, Mr. Murphy was never contacted by Claimant or anyone else concerning a complaint that Employer was violating his physical limitations and restrictions. (CX-14, p. 20).

On cross-examination, Mr. Murphy testified that he did not recall Claimant contacting him regarding a change of physicians. (CX-14, p. 21). He stated that Claimant could have notified another official. (CX-14, p. 22). He was unaware of any forms which needed to be completed for a change of treating physician. (CX-14, p. 23).

David J. Cambre, Jr.

Mr. Cambre, who has worked for Employer for 26 years and is currently employed as a control room operator, was deposed by the parties on June 28, 1999 in St. Rose, Louisiana. (CX-15). He and Claimant are members of the same union, in which Mr. Cambre served as an officer. (CX-15, p. 10). Mr. Cambre was aware of Claimant's 1994 accident and knew Claimant returned to modified light duty work thereafter. (CX-15, p. 14). Claimant told Mr. Cambre that he was restricted from performing overhead work and that his physical restrictions were not being adhered to while working with the dust system crew hanging "socks." (CX-15, pp. 14-15).

Mr. Cambre discussed with Claimant that Employer was assigning work which exceeded his limitations, but Claimant never lodged a formal complaint. (CX-15, pp. 17-18). Mr. Cambre testified that in 1995 or 1996 he spoke with Mr. Beavers, the union representative, about Claimant's situation, and was informed

Claimant had consulted counsel. He further explained that once a member has consulted counsel, the union does not try to interfere. (CX-15, p. 19).

Mr. Cambre did not discuss with Mr. Murphy whether the union could intervene with Claimant's matter based on Claimant's testimony that he was being required to work beyond his limitations. Id. He also did not approach any of Claimant's immediate supervisors or fellow co-workers to determine if Claimant was being assigned work which exceeded his limitations. Id. He did not recall Claimant asking him or any other official if Claimant could change treating physicians. (CX-15, p. 20). Mr. Cambre never advised Claimant that he could change treating physicians. (CX-15, p. 23). Furthermore, he is not aware of any formal grievance filed by Claimant with respect to his work-related injuries. Id.

On cross-examination, Mr. Cambre testified that overhead work is involved while working on the dust system crew. (CX-15, p. 26). When Claimant returned to work following the 1994 injury, he worked with the head house crew. Id. Claimant complained to Mr. Cambre on one occasion, stating that Employer assigned work which exceeded his limitations. (CX-15, p. 27). Claimant told Mr. Cambre that he continued to work despite the excessive physical requirements. (CX-15, p. 28).

Mr. Cambre also testified that Claimant's complaints about Employer not adhering to his work restrictions were never discussed during any union committee meetings. (CX-15, pp. 30-31). He explained that Claimant's matter would not have been discussed unless Claimant had filed a formal written or verbal complaint to the chairman, vice-chairman or other committee official. (CX-15, p. 32). Mr. Cambre was not asked by Claimant if he could change treating physicians. (CX-15, p. 33). He is not aware if Claimant asked any other committee member to change treating physicians. Id.

On re-direct examination, Mr. Cambre testified that he understood Claimant's restrictions to include no overhead lifting. (CX-15, p. 36). He was unsure whether this restriction pertained to one arm or both. Id.

Alvin Brown

Mr. Brown, who has worked for Employer for about 27 years, was deposed by the parties on June 28, 1999 in St. Rose, Louisiana. (CX-16). He and Claimant are members of the same union, in which Mr. Brown served as a "committee man" until 1990 and thereafter a

member. (CX-16, p. 9). He learned of Claimant's 1994 work injury from Claimant. (CX-16, pp. 10-11). Mr. Brown testified that shortly after the 1994 injury, Claimant contacted him to ask if he could change physicians. (CX-16, p. 13). He told Claimant that "if he wasn't satisfied with his doctor, he had a right to a second opinion." Id. Mr. Brown did not verify this information with the union, nor was Employer advised. (CX-16, pp. 13-14). Mr. Brown explained that although he told Claimant he was entitled to a second opinion, Mr. Brown did not authorize him to change physicians. (CX-16, p. 14).

Mr. Brown did not advise Claimant to contact Employer or the Department of Labor about changing physicians. (CX-16, p. 15). Neither did Mr. Brown contact the Department of Labor himself to change Claimant's physicians. Id. He is unaware if Claimant contacted Employer or the Department of Labor to seek a change of physicians. (CX-16, p. 18).

Mr. Brown testified that although he and Claimant discussed that Employer was not adhering to his physical limitations, Mr. Brown told Claimant to "discuss that with the company." (CX-16, p. 19). Mr. Brown did not discuss the problem with Employer. Id. He is not aware of any grievance filed by Claimant regarding Employer assigning work which exceeded his physical limitations. (CX-16, p. 20).

Medical Evidence

R. Joseph Tamimie, M.D.

Claimant first treated with Dr. Tamimie, an occupational medicine physician, on May 3, 1990 following a right shoulder injury. (CX-10, p. 1). Dr. Tamimie released Claimant to light duty work and restricted him from heavy lifting, pushing and pulling with the right arm. (CX-10, p. 2). On May 14, 1990, Claimant was released to return to regular duty. (CX-10, p. 3).

On April 27, 1994, Claimant was treated for another right shoulder injury sustained in the course of his employment. (CX-10, p. 6). Dr. Tamimie diagnosed him with a shoulder sprain and restricted him from lifting, pulling and pushing with his right arm. (CX-10, p. 7). Dr. Tamimie allowed Claimant to engage in modified work until May 30, 1994 and thereafter classified his condition as "disabled." (CX-10, p. 8).

Robert A. Steiner, M.D.

Dr. Steiner, a board-certified orthopaedic surgeon, was

deposed by the parties on two separate occasions, May 13, 1999 and October 12, 1999 in New Orleans, Louisiana. (EX-15a and 15b). He first examined Claimant at the behest of the insurance carrier on May 27, 1994, at which time Claimant provided a medical history of his shoulder problems. (EX-15a, p. 5; EX-11, p. 1). At that time, he complained of right shoulder dislocation, popping, weakness and pain. (EX-15a, p. 6; EX-11, p. 1). Dr. Steiner testified that many patients who have undergone a rotator cuff acromioplasty, such as Claimant had in 1985, have residual problems, i.e., weakness in the rotator cuff, stiffness, limitation of motion, popping and grinding. (EX-15a, pp. 7-8). Upon physical examination, Dr. Steiner felt Claimant had a recurrent tear of the right rotator cuff causing him restrictive motion and weakness. (EX-15a, p. 10). He stated that at that time, Claimant could continue light duty work with no overhead lifting involving his right upper extremity and no heavy activities. Id. He believed Claimant would be a good candidate for rotator cuff repair surgery. Id.

Claimant returned on June 1, 1994 seeking Dr. Steiner to become his treating physician. (EX-15a, p. 11; EX-11, p. 3). At that time, Dr. Steiner ordered an arthrogram of Claimant's right shoulder, which showed a complete tear of the right rotator cuff. (EX-15a, p. 12; EX-11, p. 3). Claimant did not inform Dr. Steiner that his work requirements exceeded his physical capabilities. Id. In light of Claimant's condition, Dr. Steiner recommended a rotator cuff repair surgery. Id. Dr. Steiner re-examined Claimant on July 1, 1994, at which time, he presented with complaints of recurrent right shoulder pain. (EX-11, p. 4). At this time, Claimant was allowed to continue working light duty. Id. Claimant was treated on July 18, 1994 for a re-dislocated shoulder. (EX-11, p. 5). Dr. Steiner noted that Claimant may engage in light duty work but completely restricted the use of his right arm. Id.

Dr. Steiner allowed Claimant to continue performing light duty work until surgery, which was performed on August 11, 1994. Id. The surgery was noted as successful with no complications. Claimant returned for a follow-up evaluation on August 22, 1994, at which time, Dr. Steiner noted that the wound was well-healed and there were minimal complaints of pain. (EX-11, p. 8). He restricted Claimant from work for about two weeks. Id.

Claimant returned for a follow-up evaluation on September 7, 1994, at which time his wounds were noted as well-healed and range of motion was "50% of normal." (EX-11, p. 9). Claimant continued to be restricted from work. Id. On September 21, 1994, Dr. Steiner opined Claimant could perform sedentary work in an office setting, if such work was available. (EX-11, p. 11). When Claimant returned on October 12, 1994, November 2, 1994, November

30, 1994, and December 21, 1994, Dr. Steiner noted continued improvement in his condition. (EX-11, pp. 12-15). On January 23, 1995, Claimant was released to return to modified work with no overhead activities involving the right upper extremity. (EX-11, p. 16).

In Dr. Steiner's March 6, 1995 letter to the insurance carrier, he noted that Claimant had returned to work, but complained of pain when asked to perform overhead work, which caused him to miss a day of work. (EX-11, p. 17). On this date, he further noted that Claimant had reached maximum medical improvement and can return to regular duty, but may not engage in overhead work involving the right upper extremity. Id. Dr. Steiner assigned a 10% impairment to the right upper extremity as a result of the restricted motion due to the rotator cuff tear and dislocation surgery. Id.

In an additional letter to the insurance carrier dated March 1, 1996, Dr. Steiner stated that upon review of his records, there is "absolutely no indication that [Claimant] had any cervical spine complaints or radicular complaints while [Dr. Steiner] treated him." (EX-11, p. 18; EX-15a, p. 24). He further opined that the cervical disc herniation is unrelated to the April 27, 1994 work accident. (EX-11, p. 18; EX-15a, p. 25).

Claimant was seen again by Dr. Steiner on March 13, 1996 following another work accident which occurred March 1, 1996, at which time he injured his left shoulder. (EX-11, p. 19; EX-15a, p. 26). Claimant complained of constant left shoulder pain, weakness and restricted range of motion. Id. No cervical complaints were noted in Dr. Steiner's medical records. Upon physical examination, Dr. Steiner diagnosed a left shoulder strain, but did not rule out a torn rotator cuff. (EX-11, p. 20). He released Claimant to sedentary work, but restricted him from carrying or lifting anything with the left arm and performing any overhead activities with the left upper extremity. Id.

Dr. Steiner re-evaluated Claimant on March 18, 1996, at which time the March 11, 1996 x-rays were reviewed. (EX-11, p. 21). Dr. Steiner found "irregularity and small cystic changes at the inferior aspect of the glenoid anteriorly." He further noted a slight upward riding of the humeral head in the glenoid and slight irregularity of the greater tuberosity. Id. Dr. Steiner explained that these findings were suggestive of a torn rotator cuff and recommended an MRI be performed. Id. No cervical complaints were made at this time.

Claimant was examined again by Dr. Steiner on September 17,

1996, following the June 27, 1996 arthroscopy on his left shoulder by Dr. Hamsa. (EX-11, p. 23; EX-15b, p. 21). At that time, Claimant complained of constant left shoulder pain, weakness, restricted motion and popping, as well as cramps in both arms. Id. Additionally, Dr. Steiner noted complaints of neck pain and occasional right arm numbness. Id. Upon physical examination, Dr. Steiner noted that despite surgery, Claimant had findings of rotator cuff tendinitis with restricted motion and weakness. (EX-11, p. 24). He further testified that there were "no hard objective physical findings" referable to the cervical spine. (EX-15a, p. 26). He recommended vigorous rehabilitation physical therapy for the left shoulder. Id. Claimant reported a herniated disk at the C5-6 level, but Dr. Steiner did not find any neurologic problems on the cervical spine examination. (EX-11, p. 25). He restricted Claimant from heavy lifting and overhead activity with either upper extremity, stating that he can engage only in light duty work. (EX-11, p. 25; EX-15b, p. 21).

In Dr. Steiner's October 15, 1996 letter to the insurance carrier, he opined the degenerative disk and disk herniation as seen on the January 24, 1996 MRI is unrelated to the April 27, 1994 work accident. (EX-11, p. 26). Claimant was last treated by Dr. Steiner on October 5, 1999, at which time, he complained of recurrent dislocation and pain in his right shoulder, as well as neck pain. (EX-11, p. 29; EX-15b, p. 6). At this time, Dr. Steiner reviewed the records of Drs. Hamsa, Corales, Bartholomew, Fleming and Johnston, as well as the diagnostic tests. He also examined Claimant's cervical spine which had normal findings. (EX-15b, p. 8). Furthermore, x-rays revealed no significant problems in the right shoulder. (EX-15b, p. 9). Dr. Steiner opined that Claimant has chronic rotator tendonopathy on the right side, degenerative cervical disk disease with a disk protrusion and mild cervical radiculopathy at the C5-6 level which is unrelated to the 1994 work injury. (EX-11, p. 31; EX-15b, pp. 12, 18). He further opined that Claimant is capable of performing light activities, but cannot engage in overhead activities. Id. Dr. Steiner also testified that Claimant's cervical problems are unrelated to the 1996 work injury. (EX-15b, p. 20).

Additionally, Dr. Steiner agreed with Drs. Johnston and Corales that Claimant was not a candidate for cervical surgery. (EX-15a, p. 27). He further re-affirmed that Claimant can work light duty, but should not be required to do any kind of overhead lifting activity with either extremity. (EX-15a, p. 27; EX-15b, p. 20). Dr. Steiner limited lifting and carrying requirements to 20 pounds. Id. He also testified that although it is possible shoulder pain can mask neck pain, it was "extremely unlikely" in Claimant's case in light of his symptomatology. (EX-15a, pp. 30-

31). He explained that Claimant's shoulder pain was not so severe that it would mask an obvious herniated cervical disk. (EX-15a, p. 31). Dr. Steiner stated that when he examined Claimant on March 13, 1996, there were no complaints referable to his neck. (EX-15a, p. 33). He further recommended an arthrogram of the right shoulder be performed before undergoing any further surgery in order to determine if there is a definite rotator cuff tear. (EX-15b, pp. 22, 33). Finally, Dr. Steiner reiterated that Claimant's cervical disk syndrome is totally unrelated to the 1994 and 1996 work injuries. (EX-15b, p. 34).

Rudolf V. Hamsa, M.D.

Dr. Hamsa, a board-eligible orthopaedic surgeon,[2] does not hold staff memberships or privileges at any hospital. (Tr. 62-64). He has not reapplied for any staff memberships at the time of the hearing. (Tr. 66). Although he testified that he has performed orthopaedic surgeries, he cannot perform any surgeries at the present time because he does not have staff privileges at any hospitals. Id.

Dr. Hamsa first examined Claimant on June 21, 1995 based on the referral by Claimant's attorney. (Tr. 72). On this date, Claimant presented with complaints of constant grinding in his right shoulder and neck pain. (CX-9, pp. 8-12). He further complained that his condition was getting worse. Id. Upon physical examination, Dr. Hamsa opined Claimant suffered continued rotator cuff weakness in the right shoulder. (Tr. 75). He further testified that Claimant later suffered a separate injury to his left shoulder, which he noted was presently "well and stable." (Tr. 76). Dr. Hamsa stated that Claimant has continued to be treated for right shoulder problems, as well as neck complaints. Id. He opined Claimant's present condition is "a combination of a pre-existing situation, the weakness in the rotator cuff, and the gleno-humeral joint, and the aggravation by overhead work." (Tr. 77).

Dr. Hamsa testified Claimant complained that Dr. Steiner's restrictions were not being adhered to. Id. On November 6, 1995, Dr. Hamsa noted no significant improvement in Claimant's condition and neck pain relative to both shoulders. (Tr. 78; CX-9, p. 13).

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[2] Dr. Hamsa testified that on two separate occasions he took the board certification examination. In 1973, he passed the oral examination, but failed the written exam. In 1976, he passed the written examination, but failed the oral exam. He has not since taken the certification examination.

He stated that Claimant's complaints were consistent with cervical disc syndrome. Id. He testified that his conclusion was substantiated by an MRI study which showed a ruptured disc at C5-6 and an EMG study which showed C6 root involvement. (Tr. 79; EX-23, p. 1; EX-22, p. 1). Dr. Hamsa stated Dr. Steiner's records do not indicate any cervical complaints or problems. Id. He opined that when Claimant tore his rotator cuff in 1994, he "wrenched his neck" at the same time and sustained cervical injuries. (Tr. 81).

Claimant returned for treatment on March 6, 1996 with a left shoulder injury. (CX-9, p. 16). At that time, he complained of increased neck pain and pain in both shoulders. Id. Dr. Hamsa opined Claimant had a discogenic cervical sprain, left shoulder rotator cuff sprain and right shoulder rotator cuff tear. Id. On July 31, 1996, Dr. Hamsa noted no significant improvement. (CX-9, p. 17). When Claimant returned on October 4, 1996, Dr. Hamsa noted that Claimant's neck condition was a "significant problem" and recommended he consult an orthopaedist or neurologist. (CX-9, p. 19).

Dr. Hamsa treated Claimant for the 1996 left shoulder injury, which was diagnosed as a partial rotator cuff tear. (Tr. 82). On June 27, 1996, Claimant underwent arthroscopic exploration, debridement, impingement lesion, excision of the acromial tip and release of the anterior coracoid acromial ligament by Dr. Hamsa. Id. Dr. Hamsa testified that following surgery, Claimant's left shoulder condition stabilized and no further difficulties were experienced. Id. He further opined that the continued problems with the right shoulder and a combination of the two injuries exceedingly aggravated Claimant's neck condition. (Tr. 83).

As of August 11, 1997, Dr. Hamsa opined that Claimant was "utterly and completely disabled from work activity." (CX-9, p. 21). He also opined that Claimant had a ruptured cervical disk which was related to either the 1994, 1996 or both work accidents. (CX-9, p. 21).

Dr. Hamsa agreed with Dr. Steiner's restrictions and told Claimant to not engage in any overhead lifting with either arm. Id. With respect to the vocational efforts of Ms. Seyler and Ms. Reeves, Dr. Hamsa approved the following positions and opined Claimant, even with his cervical condition, was capable of working these jobs until he underwent cervical surgery: mechanical-electronic technician; cake baker trainee; security guard (2); flow meter repair mechanic; parking cashier; and splicer packaging clerk. (Tr. 88-89). Although he approved these positions, Dr. Hamsa later opined Claimant is unable to engage in any gainful employment. (Tr. 93).

Dr. Hamsa testified that the 1997 MRI revealed Claimant's shoulder dislocated again and he has suffered a complete tear of the rotator cuff. (Tr. 90). Additionally, he explained the acromion process, also known as impingement syndrome, continued to protrude directly into the rotator cuff area. (Tr. 90-91). Dr. Hamsa opined Claimant's major recurrent problem is an "unstable right shoulder" which is aggravating his neck. (Tr. 91). He stated this problem "came to a head about July 12, 1999" when Claimant presented to him with another dislocated shoulder. Id. X-rays revealed a large "Hills-Sachs lesion" and Claimant was advised on August 24, 1999 that the subluxation syndrome was significantly worse. (Tr. 92). Dr. Hamsa attributed Claimant's condition to a "breakdown in the surgical reconstruction that was done originally in August 1994." Id. He recommended reconstructive shoulder surgery, including repair of the torn rotator cuff and the torn glenoid-labrum, as well as removal of the acromion. Id. Dr. Hamsa opined that at the time of the hearing, Claimant cannot perform any of the jobs he previously approved. (Tr. 93). Dr. Hamsa's recommendation for Claimant's neck condition remained unchanged. Id. Dr. Hamsa testified that as of August 1999, Claimant can perform sedentary work, such as lifting a telephone with his left hand. (Tr. 94). He added that if Claimant used his right extremity, which is "dominant," he "could probably do work at a bench and do small part work" with both hands. Id.

On cross-examination, Dr. Hamsa testified Claimant has a disc rupture at the C5-6 level. (Tr. 95). He explained that he originally believed Claimant sustained an injury at the C4-5 level in light of his shoulder complaints. (Tr. 99). Dr. Hamsa further explained that neck pain can mimic shoulder pain if C5-6 root involvement is present. (Tr. 100). He also testified that he was aware Claimant had a history of injury to his median nerve, but did not record this previous condition in his medical records. (Tr. 101-102). Dr. Hamsa opined it is possible that a median nerve injury can affect the results of an EMG or nerve conduction study. (Tr. 103).

Dr. Hamsa did not review the March 31, 1997 cervical spine CT scan or the April 11, 1997 myelogram. (Tr. 104). He explained that Claimant's prior right shoulder injury, which was sustained about ten years earlier, was surgically repaired by removing the tip of the acromion. (Tr. 105-106). In other words, the shoulder was not repaired arthroscopically. (Tr. 106). With respect to Claimant's current condition, Dr. Hamsa recommends surgical intervention to remove the bone protrusion. (Tr. 112; CX-9, pp. 3-5).

Dr. Hamsa spoke with representatives of the insurance carrier

to discuss Claimant's physical limitations and restrictions. (Tr. 113-114). He did not at any time contact Claimant's supervisor at Employer's facility. (Tr. 114). Dr. Hamsa did not discuss the results of Claimant's cervical diagnostic studies with Drs. Johnston or Corales. Id. Claimant was referred to a neurosurgeon, Dr. Johnston, by Dr. Hamsa, who acknowledged Dr. Johnston's findings that Claimant did not have a herniated disc in his cervical spine. (Tr. 115).

On re-direct examination, Dr. Hamsa explained that in August 1997, he changed his January 1997 opinion that Claimant could perform the identified jobs because of the lack of improvement in Claimant's condition. (Tr. 116).

On re-cross examination, Dr. Hamsa re-iterated that in January 1997, he approved four positions and disapproved two as appropriate jobs for Claimant up until the time he was to undergo surgery. (Tr. 117). However, at the time of the hearing, Dr. Hamsa opined Claimant cannot engage in any gainful employment and "remains utterly and completely disabled from work activity at this point." (Tr. 117-118). In November 1997, Dr. Hamsa opined Claimant may have been capable of sedentary work, but he did not want him to engage in any work activities. (Tr. 122). He also stated that Claimant's condition has not improved since February 1998 and Dr. Hamsa continues to await authorization to perform surgery. Id. Dr. Hamsa testified that in November 1997, Claimant attempted to perform some light yard work and was unable to do so. (Tr. 123). Claimant has not undergone a functional capacity evaluation (FCE). Id.

Dr. Hamsa testified that from January 1997 through present, he believed Claimant was capable of very minimally active work, such as bench activity, telephone work or paperwork. (Tr. 124). He explained that benchwork does not include working with generators or small parts. Id. Although Dr. Hamsa approved the security guard position on July 8, 1999, he opined that with Claimant's instability in his right upper extremity, the ten pound lifting and reaching requirements may not make this position suitable for him. (Tr. 125-126). He opined that if the position was modified to accommodate Claimant's limitations, the job would be appropriate. (Tr. 126). He also approved the customer service representative, locksmith and flow meter repair positions, if each position adhered to Claimant's restrictions with respect to lifting and overhead reaching. (Tr. 126-127).

Claimant most recently treated with Dr. Hamsa on September 17, 1999, at which time he complained of continued cervical problems. (CX-9, p. 1). Dr. Hamsa recommended (1) a re-do surgery of the

major glenohumeral mechanism; (2) a re-do of the rotator cuff mechanism; and (3) excision of the impingement syndrome. Id.

William Johnston, M.D.

Dr. Johnston, who is board-certified in neurosurgery, was deposed by the parties on December 17, 1997 in Metairie, Louisiana. (EX-14). He first evaluated Claimant based on Dr. Hamsa's referral on February 12, 1997, at which time he obtained Claimant's medical and surgical history. (EX-14, p. 5; EX-12, p. 1).

Upon physical examination, Claimant demonstrated decreased range of motion in the cervical spine. (EX-14, p. 7). No muscle spasm or cervical nerve root compression was found. Id. Dr. Johnston observed that the January 24, 1996 MRI report noted disk herniation at the C5-6 level. Id. He was unsure of the cause of Claimant's neck pain since there were no clinical signs of cervical spinal cord or nerve root compression. (EX-14, p. 8). Dr. Johnston recommended reviewing the actual MRI films and administering a myelogram and post-myelogram CT scan. Id.

Dr. Johnston reviewed the MRI film and opined that the scan demonstrated spondylotic spurring with some loss of alignment at the C5-6 level, as well as some stenosis of the spinal canal. (EX-14, p. 9; EX-12, p. 3). The myelogram and CT scan were administered on March 31, 1997 at East Jefferson Hospital. (EX-14, p. 10). These tests also revealed spondylosis at the C5-6 level and stenosis of the spinal canal. (EX-14, p. 11; EX-12, p. 5). Furthermore, he noted that the neuroforamina was narrowing, which he explained could possibly cause part of the symptoms related to Claimant's shoulder and neck pain. (EX-14, p. 12). Dr. Johnston opined that Claimant's shoulder pain in both shoulders could have a cervical component to it. Id. Dr. Johnston explained that Claimant's cervical nerve root syndrome or compression "could very well be responsible for pain in the shoulders." (EX-14, pp. 13-14). Dr. Johnston did not agree with Dr. Hamsa's opinion that Claimant suffers from a cervical disk problem. (EX-14, p. 15).

Dr. Johnston further explained that continued conservative treatment is appropriate as long as Claimant remains neurologically stable and such treatment provides relief of his symptoms. (EX-14, p. 18). Alternately, he stated that if Claimant stopped responding to conservative treatment, an anterior surgical diskectomy and fusion is standard. Id.

Claimant was re-examined by Dr. Johnston on April 2, 1997 with no significant change in his condition. (EX-14, p. 8; EX-12, p. 3). Claimant returned on May 28, 1997, at which time, Dr. Johnston

recommended Claimant seek a second opinion regarding surgery from Dr. Corales. (EX-14, p. 19; EX-12, p. 4). Dr. Johnston did not assign specific physical work restrictions to Claimant. (EX-14, p. 20).

On cross-examination, Dr. Johnston testified that he would not assign a specific impairment rating percentage until a "fairly final conclusion" was reached about Claimant's pathology. (EX-14, p. 23). He estimated that based on his last examination of Claimant, at which time Dr. Johnston found him to be "neurologically intact" with "very little gross mechanical disruption," Claimant had no more than a 10% impairment rating. Dr. Johnston stressed that this estimate was premature because no finality regarding Claimant's condition has been reached. (EX-14, p. 24).

Dr. Johnston re-affirmed his opinion that Claimant does not suffer from a ruptured cervical disk. Id. He explained that whether Claimant's neck problem stemmed from shoulder problems or a soft tissue problem, a neurosurgical procedure on Claimant's neck would not alleviate the pain. (EX-14, p. 25). Dr. Johnston further explained that nerve root compression or irritation associated with bony disease in the neck, spondylosis of bone spurs and narrowing of the foramina "classically would produce pain that would radiate from the neck through the shoulders and into the upper extremities." Id. He also stated that Claimant did not describe the aforementioned radicular pain nor were there any clinical findings that would "support involvement or suspicion of involvement" of the C6 nerve root. Id.

Dr. Johnston also testified that if Claimant's 1994 and 1996 injuries accelerated his condition, "which would be uncommon but possible," increased neck pain would have been expected. (EX-14, p. 27).

On re-direct examination, Dr. Johnston clarified that he has never recommended surgical intervention to Claimant, but rather, has only discussed possible options with him. (EX-14, p. 30).

Richard Corales, M.D.

Dr. Corales, a board-certified neurosurgeon, was accepted by the parties as an expert in the field of neurosurgery. (Tr. 197). He first examined Claimant at the behest of Employer on March 24, 1998, at which time he obtained Claimant's medical history with respect to his shoulder conditions. (Tr. 198; EX-13, p. 1). Claimant began treating with Dr. Corales in order to correlate his persistent pain complaints with diagnostic findings and studies.

(Tr. 200). Additionally, Claimant was seeking a second medical opinion with regards to Dr. Hamsa's recommendation that Claimant undergo an anterior cervical diskectomy at the C5-6 level. Id.

Upon physical examination, Dr. Corales found no motor or sensory deficits, weakness or numbness suggestive of neurological problems. (Tr. 202; EX-13, pp. 2-3). He also found no evidence of a spinal cord injury, but did elicit findings suggestive of carpal tunnel syndrome. Id. Dr. Corales diagnosed Claimant with chronic pain syndrome, but opined that all of Claimant's various complaints were not related to one problem. (Tr. 203). He did not believe Claimant had a ruptured cervical disk, but did find mild spondylosis at the C5-6 level, which he opined could cause pinched-nerve and neck problems. (Tr. 204; EX-13, p. 3). Dr. Corales further opined Claimant's hand numbness was due to minor carpal tunnel syndrome. Id.

Dr. Corales reviewed Dr. Hamsa's report in which he concluded Claimant had a ruptured C5-6 cervical disk. (Tr. 207; EX-13, p. 4). Dr. Corales opined Dr. Hamsa's opinion was "completely erroneous" and "incorrect." Id. In forming his opinion that Claimant did not have a herniated disk, Dr. Corales reviewed the MRI, which showed "spurring, osteophytes, spondylytic changes with no disk herniation at C5-6." (Tr. 207-208; EX-13, p. 4). Additionally, Claimant's 1997 myelogram and post-myelogram CT scan were made available to Dr. Corales, who concluded that these diagnostic tests further supported his impression that Claimant did not have a "soft disk," disk rupture or herniation. (Tr. 208; EX-13, p. 4). Finally, Dr. Corales noted that he found no evidence of a C6 nerve root problem. (Tr. 209).

On cross-examination, Dr. Corales testified that since he has not seen Claimant in over one and a half years, he does not have a specific recommendation as to Claimant's cervical disk condition. (Tr. 209). He stated that when he reviewed Dr. Steiner's notes, no history of a neck problem was indicated. (Tr. 210). Dr. Corales testified the neck problem did not "come to light" until Claimant began treating with Dr. Hamsa. Id. He was unable to pinpoint the age of Claimant's cervical injury. Id.

Dr. Corales explained that shoulder and neck pain sometimes mimic each other, called referred pain. (Tr. 211). He testified that he tried to elicit referred pain innumerable times from Claimant, but he was unable to obtain positive results. Id. Dr. Corales never reviewed any of Dr. Bartholomew's medical records, but after having Dr. Bartholomew's March 1998 medical notes read to him, Dr. Corales disagreed with his opinion that Claimant's "history, disk pain and herniated disks are related to the initial

injury in 1994." (Tr. 213).

Additionally, Dr. Corales opined that operating on Claimant's spurred condition would not improve his shoulder pain or hand numbness. (Tr. 215; EX-13, p. 3). He was unable to provide a future outlook on Claimant's condition since he had not evaluated him recently. (Tr. 219).

In response to the undersigned's questioning, Dr. Corales explained that the myelogram and CT scan indicated a "defect" on the left of the C6 nerve. (Tr. 220). He further stated that there was no distortion of the nerve, but assuming there was, pain would be concentrated in the C6 nerve root and radiate from the top of the bicep to the thumb. Id. Dr. Corales noted that this type of pain never radiates to the index, middle or little fingers. Id. Claimant had been complaining of finger pain in the index, middle and little fingers. (Tr. 221).

On re-direct examination, Dr. Corales admitted he was not aware that Claimant had previous median-nerve problems and that such problems could accelerate a carpal tunnel problem. (Tr. 223).

Bradley J. Bartholomew, M.D.

Dr. Bartholomew, a board-eligible neurosurgeon,[3] was deposed by the parties on March 24, 1999 in New Orleans, Louisiana. (CX-11). He first evaluated Claimant at the behest of Claimant's attorney on March 27, 1998, at which time Claimant related his medical history[4] to Dr. Bartholomew. (CX-11, p. 7; CX-8, p. 1). Dr. Bartholomew explained that shoulder pain can mimic neck pain at times, but with "a good history and physical," the two conditions are able to be differentiated. (CX-11, p. 10). Claimant did not reveal to Dr. Bartholomew that he suffered from any problems, pain, injuries or surgeries prior to 1994. (CX-11, pp. 11-12).

Claimant presented with posterior cervical pain complaints and radiating pain in his right arm to hand. (CX-11, p. 12; CX-8, p. 1). He also complained of right arm weakness and numbness in the

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[3] Dr. Bartholomew passed the written portion of the board certification examination in 1996 and has not yet taken the oral portion of the examination.

[4] Claimant reported that in 1994, "he threw his shoulder out along with neck pain going down the shoulder to the arm while using a hammer." (CX-8, p. 1). He further reported that in 1996, he "tore his left rotator cuff after a pipe fell on his left shoulder." Id.

second and third digits of his right hand. (CX-11, p. 13; CX-8, p. 1). Upon examination, Dr. Bartholomew found right upper extremity numbness, superior medial scapular spasm and a slightly depressed right bicep. Id. In differentiating a shoulder problem from a cervical problem, Dr. Bartholomew explained that shoulder pain does not radiate from the arm to the fingers nor does it extend to the neck, but rather stops at the elbow. (CX-11, pp. 15-16). Additionally, shoulder pain may cause weakness and changes in the sensory exam. (CX-11, p. 16). He opined Claimant's shoulder problem contributed to tenderness and spasm, but not weakness. Id.

Upon review of the January 24, 1997 MRI scan of the cervical spine, Dr. Bartholomew opined that Claimant suffered a disk herniation at the C5-6 level, as well as bone spurring. (CX-11, p. 17; CX-8, p. 2). He felt the disk protrusion was right-sided which is why he recommended surgery. (CX-11, p. 18). Dr. Bartholomew did not review the myelogram, but stated that the handwritten notes by Dr. Johnston regarding his findings were consistent with the MRI findings. (CX-11, p. 19). He reviewed the March 31, 1997 post-myelogram CT scan which he found to be consistent with the MRI and Dr. Johnston's handwritten notes regarding the myelogram results. (CX-11, p. 20).

Dr. Bartholomew opined that based solely on Claimant's history provided to him, Claimant's pain and herniated disk are related to the 1994 injury. (CX-11, pp. 20-21). He admitted that he has not reviewed the medical reports of Dr. Tamimie who provided the initial treatment to Claimant. (CX-11, p. 21). Dr. Bartholomew opined that Claimant should have experienced neck pain within a few weeks to a month after the 1994 accident occurred. (CX-11, p. 22). He opined Claimant was a candidate for a C5-6 anterior cervical diskectomy and fusion. (CX-11, p. 22; CX-8, p. 2).

Upon review of the MRI study, the post-myelogram CT scan report, the handwritten notes and the evaluation of Claimant, Dr. Bartholomew found no evidence of C4-5 involvement. (CX-11, p. 23). He further explained that the bone spurring indicated Claimant was having abnormal motion at the C5-6 level, which is associated with degenerative disease or a traumatic experience. (CX-11, p. 24). Dr. Bartholomew testified that if the problem is at one disk level, he usually associates that with a traumatic experience while problems at three or four levels is more consistent with degenerative change. (CX-11, p. 25). He opined if Claimant's April 27, 1994 x-ray showed the bone spurs, Dr. Bartholomew would attribute the bone spurring to a traumatic experience other than the 1994 injury. Id. He reiterated his belief that bone spurring at a single level is more than likely due to trauma. (CX-11, p. 26). Dr. Bartholomew noted that Claimant's bone spurring occurred

at a single level. Id. Based on the history Claimant provided to Dr. Bartholomew, he believed the disk herniation occurred before Claimant returned to work after the 1994 injury. Id.

Dr. Bartholomew opined Claimant was capable of returning to some sort of gainful employment in 1998. (CX-11, p. 27). With respect to shoulder restrictions, Dr. Bartholomew would have referred Claimant to an orthopaedist. Id. From a cervical standpoint, Dr. Bartholomew would restrict Claimant from performing overhead work involving repeated flexion and extension of the neck, crawling and climbing ladders. Id. He estimated a three to six month recovery period for Claimant following a single level diskectomy and fusion. (CX-11, p. 28). He further opined Claimant's post-surgical physical restrictions would remain the same. Id.

On cross-examination, Dr. Bartholomew testified that it could be difficult to differentiate between Claimant's shoulder and neck pain if the radicular neck complaints were subtle while his shoulder complaint was dominant. (CX-11, p. 30). He reaffirmed his opinion that Claimant should have experienced cervical pain within three to four weeks of the injury. (CX-11, p. 30). Dr. Bartholomew stated that it is possible for severe shoulder pain to mask cervical radiculopathy and pain. (CX-11, p. 31).

Dr. Bartholomew also reaffirmed his opinion that Claimant's bone spurring was at a single level and therefore a result of a traumatic event. (CX-11, p. 35). He opined that Claimant's shoulder injury did not cause his neck problems. (CX-11, p. 36). He further explained that the shoulder injury might have caused a muscular aspect or soft tissue aspect of bilateral trapezius pain, but should not have caused degenerative changes in the neck or herniated disks. Id.

On re-direct examination, Dr. Bartholomew testified that although he reviews vocational reports, he relies on functional capacity evaluations to determine whether a patient is capable of performing certain types of physical jobs. (CX-11, p. 37).

Vocational Evidence

Carla D. Seyler

Ms. Seyler, a licensed and certified rehabilitation counselor, was accepted by the parties as an expert in the field of vocational rehabilitation. (Tr. 162). She was retained by Employer to provide an assessment of Claimant's employability. Id. Ms. Seyler conducted an initial evaluation on December 18, 1996 and follow-up

reports on January 22, 1997 and June 11, 1999. (Tr. 163; EX-8).

She first met with Claimant on December 12, 1996, at which time she obtained information regarding his educational background and employment history. (Tr. 165). She reviewed the various medical reports and identified the following physical restrictions per Dr. Steiner's opinion: no heavy lifting and no overhead activity with the right or left upper extremity. (Tr. 164). Ms. Seyler based the labor market survey on Claimant's transferable skills and physical restrictions. (Tr. 166). Once she located positions, she sought job approval from Drs. Hamsa and Johnston. (Tr. 169). Ms. Seyler testified that Dr. Hamsa approved all positions except the retail sales clerk and Dr. Johnston stated that he does not review job descriptions. Id. Thereafter, Ms. Seyler closed Claimant's file and did not reopen it until June 1999. Id.

After reopening Claimant's file, Ms. Seyler reviewed additional medical records, Claimant's deposition, met with Claimant and Drs. Bartholomew and Johnston and conducted another labor market survey. (Tr. 170). She also wrote to Drs. Steiner and Hamsa. Id. Drs. Bartholomew, Steiner and Hamsa approved all identified positions on June 11, 1999. Id.

Ms. Seyler opined that there was a substantial number of jobs for which Claimant could compete in the job market. (Tr. 171). When she contacted the various potential employers, she informed them of Claimant's physical limitations to determine if alternate jobs were suitable and appropriate. (Tr. 172). Ms. Seyler testified that the 1999 labor market survey yielded a range of hourly wages from $7.00 to $8.00, while the 1997 labor market survey yielded a range of hourly wages from $5.00 to $10.00. (Tr. 173). She further opined that the jobs identified can be performed by Claimant and are within his geographic community, age, education and employment skills. (Tr. 173-174).

Ms. Seyler provided Claimant with a vocational test and asked him to complete and return it if he was interested in returning to work, but she never received the form from him. (Tr. 176). She reaffirmed that Claimant is employable within the labor market and believed he was capable of performing light duty work as of July 1996, as opined by Dr. Steiner. (Tr. 178).

On cross-examination, Ms. Seyler testified that the potential employers with whom she spoke were aware of Claimant's medical condition and disabilities. (Tr. 179). In 1997, the following positions and potential employers were identified:

1. Mechanic electronic technician with WEMCO, Inc. ($10.00/hr) - duties include repairing and adjusting sewing machines using hand tools. Employees may alternate sitting, standing and walking. No overhead work is required. On rare occasions, lifting up to 40-50 pounds may be required, but assistance is provided. (Tr. 180; EX-8, p. 20).

2. Cake baker trainee with McKenzie's ($5.00/hour) - duties include preparing bakery goods and keeping the work area clean. Employees may alternate standing and walking and may sit during breaks. Lifting requirements do not exceed 20-30 pounds. Physical requirements include frequent reaching and handling, but no overhead work is required. (Tr. 180; EX-8, p. 21).

3. Retail sales clerk with Sears Roebuck ($7.00/hour) - duties involve assisting customers with hardware purchases. Alternate standing and walking are allowed. Lifting requirements do not exceed 25 pounds and no overhead work is required. (Tr. 180; EX-8, p. 21).

4. Security guard with Riverside Hilton ($7.05/hour) - duties involved patrolling hotel grounds and documenting incident information. Alternate sitting, standing and walking is allowed. Physical requirements include bending, stooping, kneeling and occasional stair climbing. No heavy lifting or overhead work is required. (Tr. 180; EX-8, p. 21).

5. Flow meter repair mechanic with Thompson Equipment ($6.30/hr) - duties involve taking flowmeters apart and sandblasting, painting and lining them. Alternate sitting, standing and walking is allowed. Lifting up to 25 pounds is required. Work is performed at waist level so that no overhead work is required. (Tr. 180; EX-8, p. 21).

6. Gate guard with Bayou State Security ($5.50-$6.00/hour) - duties involve providing security services at an assigned site. Alternate sitting, standing and walking is allowed. Lifting does not exceed 10 pounds and no overhead work is required. (Tr. 180; EX-8, p. 22).

7. Parking cashier with Riverside Hilton ($5.00/hour) - duties involve accepting payments for parking. Employees may sit or stand in the parking booth. No heavy lifting or strenuous physical demands are involved. No overhead work is required. (Tr. 180; EX-8, p. 22).

8. Splicer packaging clerk with K & B ($6.35/hour) - duties

involve using a hand held splicer to splice film, placing photos into envelopes and packaging shipments. Alternate sitting, standing and walking is allowed. No repetitive overhead work is required, but employees must be able to reach and handle. (Tr. 180; EX-8, p. 22).

In the June 11, 1999 vocational assessment and labor market survey, Ms. Seyler identified the following positions and potential employers:

1. Flow meter repair mechanic with Thompson Equipment - duties involve taking apart, performing sandblasting, painting, and lining work on flow meters. Job training is provided and a high school education is preferred. The employee must pass a general knowledge test covering reading and math skills. Physical requirements include alternate sitting, standing, walking, occasional bending and lifting up to 25 pounds. No overhead lifting is required. (EX-8, p. 9).

2. Locksmith with Custom Lock & Key - duties involve installing, repairing, rebuilding and servicing mechanical or electrical locking devices, as well as using handtools and cutting or duplicating keys. Job training is provided and the employee must be capable of reading and writing. Physical requirements include alternate sitting, standing, walking and lifting no more than 20 pounds. Hourly wage rates begin at $7.00. No overhead lifting is required. (EX-8, p. 9).

3. Security officer with Hyatt Hotel and Riverside Hilton - duties include patrolling hotel premises to maintain order and enforce regulations. Job training is provided and the employee must be capable of reading and writing to complete incident reports. No overhead lifting is required. (EX-8, pp. 9-10).

The Hyatt Hotel position requires occasional sitting at a desk to check-in employees and dispatch other security officers. Additionally, employees may alternate standing and walking, but can sit during breaks and lunch. Lifting is limited to 20 pounds and wages begin at $7.65 per hour. (EX-8, p. 10).

The Riverside Hilton position requires occasionally driving a security cart or climbing stairs. Employees may alternate standing and walking, but may sit during lunch. Lifting is less than 20 pounds and wages begin at $7.05 per hour. (EX-8, p. 10).

4. Customer service phone representative with Home Depot -

> duties include helping customers with questions regarding different products. Job training is provided and employees must possess good communication skills, as well as be able to read and write. This position was classified as sedentary, with the ability for the employee to alternate positions as needed. No heavy lifting is involved and wages are between $7.00 - $8.00 per hour. No overhead lifting is involved. (EX-8, p. 10; Tr. 181).

Ms. Seyler opined that Claimant possessed transferable skills to transition from master mechanic to any of the positions identified. (Tr. 184). She further believed that the best job match for Claimant would be performing light mechanical repair, "like the locksmith, or the tie-manufacturing company, repair the sewing machines." (Tr. 187). No previous experience was required for any of the identified positions, but Claimant's skills "would be very attractive to these types of employers." Id.

In response to the undersigned's questioning, Ms. Seyler explained that the splicer position description requires occasional, not repetitive, use of a control on a machine overhead. (Tr. 190). With respect to the flow meter repair mechanic job description which does not indicate whether overhead work is required, Ms. Seyler testified that she asked the employer whether any overhead lifting was required and was told "no." (Tr. 190-191). Ms. Seyler explained that although she did not indicate in the 1999 survey, the following positions do not require overhead work: flow meter repair mechanic; locksmith; security officer; and customer service representative. (Tr. 191-193).

Ms. Seyler also testified that if any of the identified positions required overhead lifting, she would have listed that requirement in the job description. (Tr. 194).

The Contentions of the Parties

Claimant argues that his cervical complaints arose "shortly after" the April 27, 1994 work accident and thus, the cervical condition is work-related. He further claims that due to his work-related shoulder and cervical injuries, the request for cervical surgery, which was recommended by Dr. Hamsa, is necessary and reasonable. Additionally, Claimant contends that until surgery is performed, he has not yet reached maximum medical improvement. Finally, it is maintained that Employer failed to establish suitable alternative employment since Ms. Seyler's labor market surveys contain "unscientific, non-random descriptions of selected jobs."

Employer/Carrier, on the other hand, argue that Claimant's cervical injuries are unrelated to either the 1994 or 1996 work accidents and resultant injuries. Additionally, it is argued that Claimant reached maximum medical improvement on March 10, 1997. Furthermore, it is contended that Claimant's request for cervical surgery should be denied because no physician, except Dr. Hamsa, has recommended such surgery. Employer/Carrier urge the undersigned to discredit Dr. Hamsa's testimony and medical opinion in light of his lack of qualifications. It is also maintained that suitable alternative employment was established by Ms. Seyler and that Claimant failed to act diligently in seeking alternate employment and is thus precluded from permanent total disability compensation benefits. Moreover, Employer/Carrier contend Section 8(f) relief should be granted since (1) Claimant had a pre-existing permanent right shoulder impairment resulting from a prior non-occupational torn rotator cuff and a torn rotator cuff in his left shoulder; (2) the condition was manifest to Employer; and (3) the prior tear combined with the 1994 work-related injury contributed to a materially and substantially greater disability than would have resulted from the March 1, 1996 injury alone.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F. 2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Dr. Hamsa's Qualifications

Employer submitted a motion in limine to exclude the testimony

of Dr. Hamsa because he "is not qualified to provide expert testimony" according to Daubert v. Merrill-Dow Pharmaceutical, Inc., 509 U.S. 579 (1993). (EX-30). It is argued that Dr. Hamsa is not board-certified or board-eligible.[5] Claimant, on the other hand, argues that board eligibility nor board certification is a prerequisite for being qualified as an expert witness under Rule 702 of the Federal Rules of Civil Procedure.

The administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. The judge may rely upon his personal observation and judgment to resolve conflicts in the medical evidence. Furthermore, he is not bound to accept the opinion of a physician if rational inferences cause a contrary conclusion. See e.g., Parkland, Inc. v. Director, OWCP, 877 F.2d 1030, 1033 (D.C. Cir. 1989); Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750, 760 (5th Cir. 1981); Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962).

The trier of fact alone determines the credibility and weight to be attached to the testimony of a medical expert and can base his finding on a physician's opinion and, then, on another issue, find contrary to the same physician's opinion on that issue. Pimpinella v. Universal Maritime Service, Inc., 27 BRBS 154 (1993).

As noted hereinabove, Dr. Hamsa, who is Claimant's treating physician, is an orthopaedic surgeon who has failed to attain board certification on two separate occasions. (Tr. 62-64). Additionally, he testified that he is board-eligible but does not actually meet the guidelines for board eligibility. Id. Furthermore, he does not hold staff privileges at any hospital and thus, does not perform surgeries. (Tr. 66).

Dr. Steiner, who was also Claimant's treating physician, is a board-certified orthopaedic surgeon who holds staff privileges at East Jefferson Hospital, Doctor's Hospital of Jefferson, Touro Infirmary, Memorial Hospital and Kenner Regional. (EX-15a, pp. 36-37). He received his first certification in 1986 and was re-certified in 1996. (EX-15a, p. 36).

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[5] According the American Board of Orthopaedic Surgery Examination requirements, only candidates who pass Part I of the written examination become Board eligible for five years. Candidates who do not take and pass Part II (the oral examination) within those five years are no longer Board eligible and must reapply for Part I. In the present matter, Dr. Hamsa admitted that he has not reapplied for Part I since apparently 1976. (Tr. 62-64).

Additionally, Dr. Johnston is board-certified in neurosurgery. (EX-14). Dr. Corales, who was accepted as an expert in the field of neurosurgery, has been board-certified since 1984. (Tr. 196-197). Finally, Dr. Bartholomew testified that he is a board-eligible neurosurgeon since he has not yet taken and passed the oral portion of the examination.

Although credentials, such as a board certification, provide more probative weight to be accorded to a physician's medical opinion, they alone are not necessarily determinative. Peteet v. Dow Chemical Co., 868 F.2d 1428 (5th Cir. 1989). Thus, in the present matter, although Dr. Hamsa's lack of credentials and qualifications may accord his opinions less probative weight, it does not totally preclude his testimony and medical opinions. Id.

In light of the foregoing, I find Drs. Steiner, Johnston and Corales' credentials provide a basis for granting more probative weight to their medical opinions which are deemed more persuasive and convincing than Drs. Hamsa and Bartholomew's opinions who do not share the credentials or qualifications of opposing physicians. In reviewing the medical records and determining whether Claimant's cervical condition was work-related, I accorded greater probative weight to the opinions of Drs. Steiner, Johnston and Corales, whose qualifications as a board-certified orthopaedic surgeon and board-certified neurosurgeons, respectively, I found to be more convincing and rational than those of Dr. Hamsa and Dr. Bartholomew, who lacked qualitative credentials, in particular, a board certification in their respective fields of practice. Additionally, neither Dr. Hamsa, nor Dr. Bartholomew examined Claimant more frequently than Dr. Steiner, who began treating him in May 1994 and continuing thereafter.

In fact, Dr. Steiner began treating Claimant on May 27, 1994, approximately one month after the work accident occurred, and continued treatment through March 6, 1995, at which time Dr. Steiner opined Claimant reached maximum medical improvement and assigned a 10% impairment rating to his right upper extremity. (EX-11, pp. 1, 17). Claimant was told to return on an "as needed" basis. More than one year after the work accident occurred, Claimant began treating in June 1995 with Dr. Hamsa. (Tr. 72). When Claimant was injured a second time, he was treated by both Drs. Steiner and Hamsa. Based on the foregoing, I accord greater probative weight to Dr. Steiner's medical opinion since he evaluated and examined Claimant more thoroughly and frequently over time for the two shoulder injuries and resultant disabilities than did Dr. Hamsa, who began treating Claimant more than one year after the 1994 injury occurred.

Having concluded that greater probative weight will be accorded to the medical opinions and testimony of Drs. Steiner, Johnston and Corales, I will determine whether Claimant's cervical injury and condition are related to the 1994 or 1996 work accidents.

B. Compensable Injury

According to the Act, an injury is defined as an "accidental injury or death arising out of and in the course of employment[.]" 33 U.S.C. § 902(2). A presumption that an injury arose out of the course of employment arises once a claimant establishes a prima facie claim for compensation. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 91 (1990). In order to establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that he sustained physical harm or pain and that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984); Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1982).

Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

In the present matter, the parties stipulated that Claimant suffered from two separate work-related shoulder injuries on April 27, 1994 and March 1, 1996, respectively. At issue, however, is whether Claimant's cervical injuries and condition are related to either shoulder injury and consequently the result of one or both of the work accidents.

The 1994 Injury

As noted hereinabove, Claimant first presented with cervical complaints on June 21, 1995 when he began treatment with Dr. Hamsa. Prior to this date, Claimant initially treated with Dr. Tamimie on April 27, 1994, the date of the accident. (CX-10, p. 6). At that time, no cervical complaints were made. Thereafter, on May 27, 1994, Claimant began treating with Dr. Steiner, who never noted any cervical complaints. Upon initial examination, Dr. Steiner felt Claimant had a recurrent tear of the right rotator cuff. (EX-15a, p. 10). He opined Claimant would be a good candidate for rotator cuff surgery. Id. On August 11, 1994, Claimant underwent a

rotator cuff repair. (EX-11, p. 5). Dr. Steiner opined Claimant reached maximum medical improvement for the 1994 injury on March 6, 1995. (EX-11, p. 17). Throughout the course of his treatment, Dr. Steiner found no evidence of cervical spine pathology during the period he treated Claimant following the 1994 injury. (EX-11, p. 18; EX-15a, p. 24). He further stated that his records contain "absolutely no indication that [Claimant] had any cervical spine complaints or radicular complaints while [Dr. Steiner] treated him." (EX-11, p. 18; EX-15a, p. 24). Importantly, Claimant did not testify that he reported neck complaints or problems to Dr. Steiner. Finally, Dr. Steiner opined that any cervical disk herniation is unrelated to the April 27, 1994 work accident. (EX-11, p. 18; EX-15a, p. 25).

More than one year after the accident occurred, Claimant presented to Dr. Hamsa on June 21, 1995 with complaints of cervical pain. (CX-9, pp. 8-12). It should be noted that Dr. Steiner never noted that Claimant suffered from cervical pain or discomfort. Additionally, Drs. Johnston and Corales never noted or determined any basis or cause for Claimant's alleged cervical complaints. Upon examination and after reviewing certain diagnostic tests, Dr. Hamsa opined that Claimant suffered from a ruptured cervical disk at the C5-6 level. (Tr. 79). Dr. Hamsa attributed the cervical problems to the 1994 work-related accident during which Claimant sustained a shoulder injury. (Tr. 81).

It is further noted that only Drs. Tamimie, Steiner and Hamsa treated Claimant for his 1994 right shoulder injury.

Based on the foregoing, I find Dr. Steiner's medical opinion well-reasoned and more persuasive in establishing Claimant did not have a work-related cervical condition since he examined Claimant more frequently and thoroughly over time than Dr. Hamsa. Over his course of treatment, his meticulous and detailed medical notes do not note that Claimant ever complained of cervical pain or discomfort. Furthermore, Dr. Steiner's notes do not acknowledge that Claimant suffered from cervical pain or discomfort. Moreover, Dr. Steiner had more opportunity to examine and evaluate Claimant over time than did Dr. Hamsa, who began treating Claimant more than one year after the injury occurred. Based on the foregoing, I find Dr. Steiner's medical opinion to be more convincing and persuasive than Dr. Hamsa's opinion. As explicated more thoroughly hereinabove, I find Dr. Steiner's superior qualifications as a board-certified orthopaedic surgeon further supports my reliance on his sound medical opinions, to which I accord greater probative weight.

Moreover, the latent appearance of the cervical complaints,

which was more than one year following the accident, makes it highly incredible that such a condition was related to the April 27, 1994 work accident. Dr. Steiner testified that although it was possible Claimant's shoulder pain masked the neck pain, it was "**extremely unlikely**" in light of Claimant's symptomatology. (EX-15a, pp. 30-31). He further explained that **Claimant's shoulder pain was not so severe that it would mask an obvious herniated cervical disk**. (EX-15a, p. 31). Moreover, Dr. Bartholomew opined Claimant should have experienced neck pain within a few weeks to one month after the accident occurred, if he had a herniated disk. (CX-11, p. 22). However, as noted hereinabove, no cervical complaints were recorded until Claimant presented to Dr. Hamsa on June 21, 1995, one year and two months after the accident occurred.

Based on Dr. Steiner's well-reasoned and persuasive medical opinion and given the latency of Claimant's cervical complaints, I find that Claimant has not established that he suffered a harm or pain to his cervical region as a result of the April 27, 1994 work accident. Consequently, I conclude that Claimant has failed to establish a prima facie claim for a compensable cervical injury and is therefore not entitled to the Section 20(a) presumption that his cervical injury and condition arose out of and in the course of his employment with Employer. See Greenwich Collieries, supra.

The 1996 Injury

As stated above, Claimant presented with cervical complaints on June 21, 1995, which was approximately seven months before the March 1, 1996 work accident occurred. Given the temporal period, it is impossible to conclude that Claimant's 1996 work injury caused the cervical condition, which arose in 1995.

Following the 1996 injury, Claimant returned to Dr. Steiner, although he was concurrently treating with Dr. Hamsa. At that time, Dr. Steiner found "**no hard objective physical findings referable to the cervical spine**. (EX-15a, p. 26). The January 24, 1996 MRI showed, according to Dr. Hamsa, a ruptured disk at the C5-6 level. (Tr. 79; EX-23, p. 1). Although Claimant was diagnosed with a herniated disk at the C5-6 level by Dr. Hamsa, Dr. Steiner did not find any problems with the cervical region during the cervical spine exam. (EX-11, p. 25). On October 15, 1996, Dr. Steiner opined that **any disk problems seen on the January 24, 1996 MRI are unrelated to the April 27, 1994 work accident**. (EX-11, p. 26). Examination of Claimant's cervical spine yielded normal findings. (EX-15b, p. 8). Dr. Steiner ultimately concluded that **Claimant's cervical problems are unrelated to neither of the work-related accidents**. (EX-15b, pp. 12, 18, 20).

Dr. Hamsa, on the other hand, opined that the ruptured cervical disk at the C5-6 level was related to either of the work-related accidents. (CX-9, p. 21). He believed that Claimant had an "unstable right shoulder" condition which continued to aggravate his neck. (Tr. 91). Dr. Hamsa also believed that neck pain can mimic shoulder pain if C5-6 root involvement is present. (Tr. 100). He referred Claimant to Dr. Johnston for neurological evaluation. (Tr. 115). Dr. Hamsa acknowledged that Dr. Johnston did not agree with his (Dr. Hamsa's) findings that Claimant had a herniated disk. Id.

Dr. Bartholomew also opined that Claimant suffered a herniated disk at the C5-6 level. (CX-11, p. 17; CX-8, p. 2). He believed that since Claimant's problem lie at one disk level, instead of multiple disk levels, his injury was probably due to a single traumatic experience, as opposed to degeneration. (CX-11, pp. 24-25). Based on the history provided to him by Claimant, Dr. Bartholomew believed the herniated disk occurred after the first injury, but before the second. (CX-11, p. 26). Although Dr. Bartholomew stated that based on Claimant's history alone, the herniated disk could be attributable to the 1994 injury, he opined that Claimant should have experienced cervical pain three to four weeks following the accident. (CX-11, p. 30). Additionally, **Dr. Bartholomew did not believe Claimant's shoulder injury caused his neck problems**. (CX-11, p. 36). He further explained that **the shoulder injury might have caused a muscular or soft tissue aspect of pain, but should not have caused degenerative changes in the neck or herniated disks**. Id.

Dr. Johnston, who evaluated Claimant after the second work accident based on Dr. Hamsa's referral, found **no clinical signs of cervical spinal cord or nerve root compression**. (EX-14, p. 8). He totally disagreed with Dr. Hamsa's findings and unequivocally stated that Claimant does not suffer from a ruptured disk. (EX-14, pp. 15, 24). He explained that certain neck problems "classically would produce pain that would radiate from the neck through the shoulders and into the upper extremities," but that **Claimant did not describe the aforementioned radicular pain**. (EX-14, p. 25). Furthermore, there were **no clinical findings that would "support involvement or suspicion of involvement" of the C5-6 nerve root**, which in turn would cause Claimant's neck pain. Id. Finally, Dr. Johnston opined that if Claimant's 1994 or 1996 injuries accelerated his condition, **"which would be uncommon,"** Claimant might experience neck pain. (EX-14, p. 27).

Additionally, Dr. Corales, who evaluated Claimant after the 1996 shoulder injury, found **no evidence of a spinal cord injury**. (Tr. 202; EX-13, pp. 2-3). Dr. Corales reviewed the 1997 MRI and

although he found mild spondylosis at the C5-6 level, which he opined could cause pinched nerve and neck problems, he did not believe Claimant had a ruptured cervical disk. (Tr. 204; EX-13, p. 3). In fact, Dr. Corales believed Dr. Hamsa's opinion that Claimant suffered from a ruptured cervical disk to be "**completely erroneous and incorrect**." (Tr. 207; EX-13, p. 4). Throughout his testimony, Dr. Corales reiterated that he found **no evidence of C6 nerve root problems, nor did he find a "soft disk," disk rupture or herniation**. (Tr. 209). Additionally, Dr. Corales explained that he tried on numerous occasions to elicit "referred pain"[6] from Claimant, but never obtained positive results. (Tr. 211). Additionally, he disagreed with Dr. Bartholomew's opinion that Claimant's herniated disks and disk pain are related to the initial 1994 injury. (Tr. 213). Moreover, Dr. Corales reviewed the myelogram and CT scan, which indicated a "defect" on the left of the C6 nerve, and further explained that assuming distortion of the nerve was present (which was not), pain would not radiate to the index, middle or little digits. (Tr. 220). Claimant, in fact, was complaining of pain radiating into his index, middle and little fingers. (Tr. 221).

In light of the foregoing medical opinions, I find that Claimant's cervical complaints are not related to the 1996 work accident. After reviewing the various medical records and testimony, I find Drs. Steiner, Johnston, Corales and Bartholomew extremely well-reasoned and persuasive in establishing that the cervical condition is not attributable to the 1996 shoulder injury. Every physician, except Dr. Hamsa, agree that the cervical condition is unrelated to the shoulder injuries. Based on Drs. Steiner, Corales and Johnston's sound medical opinions and superior qualifications, I find that Claimant has not established that he suffered a harm or pain to his cervical region as a result of the March 1, 1996 work accident. Consequently, I conclude that Claimant has failed to establish a prima facie claim for a compensable cervical injury and is therefore not entitled to the Section 20(a) presumption that his cervical injury and condition arose out of and in the course of his employment with Employer. See Greenwich Collieries, supra.

C. Nature and Extent of Disability

Having concluded that Claimant's cervical injury is not a compensable injury and based on the parties' stipulations that Claimant suffers from two compensable shoulder injuries, the burden

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[6] Dr. Corales explained that "referred pain" is also known as shoulder and neck pain which "mimic" each other. (Tr. 211).

of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra., at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100

(1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

D. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, ftn 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The 1994 Injury

In light of the medical evidence presented by the parties, I find and conclude that Claimant reached maximum medical improvement on March 6, 1995 with respect to his right shoulder injury.

Following the August 11, 1994 surgery, Claimant's condition with respect to his right shoulder improved. Dr. Steiner noted on March 6, 1995 that Claimant had reached maximum medical improvement with respect to the right shoulder condition. (EX-11, p. 17). At that time, Claimant was assigned a 10% impairment rating to his right upper extremity and was released to return to work, but was restricted from overhead work involving his right upper extremity. Id. According to the record medical evidence, Claimant was not treated by any physicians from March 6, 1995 until June 21, 1995, at which time, Dr. Hamsa began treating him for right shoulder and neck pain. (CX-9, pp. 8-12). Dr. Hamsa opined that Claimant continues to suffer from a right shoulder condition, is a candidate for surgical intervention and thus, has not reached maximum medical improvement. Neither Drs. Johnston, Corales nor Bartholomew examined Claimant for the 1994 shoulder injury. Additionally, no other physician has disputed Dr. Steiner's opinion regarding the date of maximum medical improvement.

Given Dr. Steiner's superior qualifications as a board-certified orthopaedic surgeon and the length of time over which he treated Claimant's right shoulder injury, I find his opinion establishing the date Claimant reached maximum medical improvement more persuasive and convincing than the opinion of Dr. Hamsa, who does not possess such qualitative credentials and did not examine Claimant as thoroughly and frequently over time or in proximity to the injury. Therefore, I find and conclude Claimant reached maximum medical improvement on March 6, 1995 with respect to his right shoulder injury. Accordingly, all periods of disability prior to March 6, 1995 are considered temporary under the Act.

In light of the foregoing, I find Claimant was temporarily and totally disabled from April 27, 1994, the date of injury, through March 6, 1995, the date he reached maximum medical improvement, per Dr. Steiner's opinion. Thus, Claimant is entitled to temporary total disability compensation benefits from April 27, 1994 through March 6, 1995, based on his average weekly wage of $573.55, and a corresponding compensation rate of $382.39 ($573.55 x 66⅔% = $382.39).

Thereafter, having reached maximum medical improvement and having a 10% impairment rating assigned to him, Claimant was unable to return to his former regular employment as a mechanic because he was restricted from overhead reaching and heavy lifting, thus limiting him to lighter duty work. Because Claimant cannot return to his former employment as a mechanic, he has established a case of total disability. Since Ms. Seyler did not establish suitable alternative employment until January 22, 1997, which is explicated more thoroughly hereinbelow, I find that after reaching maximum medical improvement, Claimant's disability status was permanent and total. Thus, Claimant is entitled to permanent total disability compensation benefits from March 7, 1995 through March 1, 1996, the date of the second work-related injury, at which time, his status reverted to temporary and total, based on his average weekly wage of $573.55, and a corresponding compensation rate of $382.39 ($573.55 x 66⅔% = $382.39).

The 1996 Injury

In light of the medical evidence presented by the parties, I find and conclude that Claimant reached maximum medical improvement on September 17, 1996 with respect to his left shoulder injury.

The medical evidence of record established that Claimant underwent a arthroscopy on his left shoulder on June 27, 1996 which was performed by Dr. Hamsa. (Tr. 82). Dr. Hamsa testified that following the surgery, Claimant's left shoulder condition

stabilized and no further difficulties were experienced. Id. However, when Claimant returned to Dr. Steiner on September 17, 1996, he complained of constant pain in the left shoulder. (EX-11, p. 23, EX-15b, p. 21). At this time, Dr. Steiner recommended vigorous rehabilitation physical therapy for the left shoulder.[7] (EX-15a, p. 26). Claimant was restricted from overhead reaching and heavy lifting with either upper extremity. (EX-11, p. 25; EX-15b, p. 21). Thereafter, no further complaints of left shoulder pain or discomfort were noted by Drs. Hamsa or Steiner.[8] It should be noted that Drs. Corales, Johnston and Bartholomew examined Claimant to determine the pathology of the right shoulder and cervical conditions. Thus, the aforementioned physicians' medical records do not contain any notes regarding Claimant's left shoulder condition.

In light of the foregoing medical evidence, in particular, Dr. Steiner's records, which indicate that Claimant continued to seek treatment for the left shoulder condition, despite Dr. Hamsa's testimony that Claimant's left shoulder condition had stabilized, I find that Claimant reached maximum medical improvement on September 17, 1996, the date on which Dr. Steiner recommended Claimant engage in a physical therapy program. Since there were no recorded complaints regarding the left shoulder condition after this date and in the absence of any record evidence of any physical therapy thereafter, I find September 17, 1996 a reasonable and appropriate date on which Claimant reached maximum medical improvement with respect to his left shoulder condition.

Thus, Claimant's status reverted to temporary total disability when he injured his left shoulder on March 1, 1996. Thus, Claimant is entitled to temporary total disability compensation benefits from March 1, 1996 through September 17, 1996, and thereafter permanent total disability compensation benefits from September 18, 1996 through January 22, 1997, based on his average weekly wage of $606.92, and a corresponding compensation rate of $404.63 ($606.92 x 66⅔% = $404.63).

Because Claimant cannot return to his former employment as a mechanic, he has established a case of total disability.

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[7] The record is devoid of any evidence establishing how long Claimant was engaged in a physical therapy program.

[8] Dr. Steiner's subsequent medical records dated October 15, 1996 are devoid of any left shoulder complaints by Claimant. As well, Dr. Hamsa's subsequent medical records dated August 11, 1997 do not indicate that Claimant complained of left shoulder problems.

Thereafter, since suitable alternative employment was established by Ms. Seyler on January 22, 1997, as explicated more thoroughly hereinbelow, and certain identified positions were approved by Dr. Steiner, Claimant's status became permanent and partial. Thus, Claimant is entitled to permanent partial disability compensation benefits from January 22, 1997 and continuing through present, based on the difference between his average weekly wage at the time of the injury and his post-injury wage earning capacity. Accordingly, Claimant shall receive $228.36 per week ($606.92 - $264.40 = $342.52 x 66⅔% = $228.36) from January 22, 1997 and continuing, based on his average weekly wage of $606.92 and his post-injury wage earning capacity of $264.40.[9]

D. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

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[9] Claimant's post-injury wage earning capacity is based upon the hourly wages of the positions which I found to be suitable alternative employment: three security guard positions ($7.05/hr, $7.65/hr and $7.05/hr, respectively); gate guard ($5.50/hr); parking cashier ($5.00/hr); locksmith ($7.00/hr); and customer service representative ($7.00/hr). In the absence of any evidence establishing that Claimant would earn more than the minimum hourly wages indicated for each position, I conclude that Claimant would earn the starting salary rate. His post-injury wage earning capacity was determined by averaging the hourly wages of the identified positions and multiplying that figure by 40 hours per week: ($7.05 + $7.65 + $7.05 + $5.50 + $5.00 + $7.00 + $7.00 = $46.25 ÷ 7 = $6.61 x 40 hours per week = $264.40).

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F. 2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F. 2d 1039 (5th Cir. 1992). However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F. 2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F. 2d at 1042-1043; P & M Crane, 930 F. 2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F. 2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F. 2d 1003 (5th Cir. 1978).

In the present matter, Employer/Carrier rely on the vocational reports and labor market surveys of Ms. Seyler to establish the existence of suitable alternative employment. Since Claimant returned to work, albeit modified or restricted duty involving no overhead activity, after the 1994 injury, the labor market surveys are applicable to the 1996 injury, after which Claimant did not return to any type of gainful employment.

After reviewing Ms. Seyler’s labor market surveys, I find suitable alternative employment was established as early as January 22, 1997. As explicated more thoroughly hereinabove, the following positions were identified in the 1997 labor market survey: (1) mechanical electronic technician; (2) cake baker trainee; (3) retail sales clerk; (4) security guard; (5) flow meter repair mechanic; (6) gate guard; (7) parking cashier; and (8) splicer

packaging clerk.[10]

Therefore, based on the descriptions of the job duties by Ms. Seyler, I find the following positions are suitable and appropriate for Claimant because the physical requirements conform with his physical limitations:[11] security guard; gate guard; and parking cashier. Each of these positions did not require any overhead activities nor any lifting or carrying requirements which exceeded 20 pounds. (Tr. 180; EX-8, pp. 20-22).

I find the mechanical electronic technician position does not constitute suitable alternative employment since lifting requirements up to 40-50 pounds may be required. Although it was noted that assistance is provided with lifting, it is undetermined as to what proportion Claimant would be required to lift, if so required. In light of the foregoing, I find this position to be unsuitable.

I also find the cake baker trainee position does not constitute suitable alternative employment. It was noted that lifting requirements do not exceed 20-30 pounds, which do not conform with Dr. Steiner's restrictions. Accordingly, I find this position to be unsuitable.

Additionally, I find the retail sales clerk position to be inappropriate since employees may be required to lift up to 25 pounds, an amount which exceeds Claimant's physical limitations. Therefore, I find this position does not constitute suitable alternative employment.

Moreover, the flow meter repair mechanic position required lifting up to 25 pounds, which exceeded Claimant's physical

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[10] It should be noted that Dr. Hamsa approved each of these positions identified in 1997, except the retail sales clerk position and opined that Claimant was capable of performing the duties of each job. He later recanted his opinion stating that Claimant was not capable of performing any identified positions due to lack of improvement in his condition. However, since I accorded greater probative weight to the medical opinions of Dr. Steiner, due to his qualifications and the lengthy period over which he treated Claimant, I will determine the suitability of each position identified in the 1997 survey by utilizing Dr. Steiner's physical restrictions.

[11] Dr. Steiner's physical restrictions include: no heavy lifting or carrying over 20 pounds and no overhead activity. (EX-11, p. 16; EX-15a, p. 27; EX-15b, p. 20).

restrictions. Thus, I find this position does not constitute suitable alternative employment and is therefore unsuitable for Claimant.

Finally, I find the splicer packaging clerk position to be unsuitable since Ms. Seyler testified that one of the physical requirements of the job is occasional use of a control on a machine **overhead**. Since Claimant has been restricted from any overhead activity, the splicer packaging clerk position does not constitute suitable alternative employment.

As noted hereinabove, I found the security guard, gate guard and parking cashier positions identified in the January 22, 1997 labor market survey to constitute suitable alternative employment since the job requirements conformed with Claimant's physical capabilities and did not exceed his limitations. Accordingly, I find that Employer established suitable alternative employment on January 22, 1997.

With respect to the 1999 labor market survey, I find that each of the positions, except the flow meter repair mechanic,[12] constituted suitable alternative employment since the physical requirements of each job conformed with Claimant's physical capabilities and did not exceed the physical restrictions placed upon him by Dr. Steiner. Additionally, Drs. Steiner, Hamsa and Bartholomew approved each of the positions identified in the 1999 survey as within Claimant's physical limitations, which further buttresses my conclusion. Therefore, I find that Employer established suitable alternative employment on June 11, 1999, as well as on January 22, 1997.

It should be noted that I find Claimant's argument that Ms. Seyler's labor market surveys are "unscientific non-random descriptions" without merit and unpersuasive. To the contrary, I found Ms. Seyler's 1997 and 1999 labor market surveys to be precise and specific as to the nature and terms of each job position, the potential employer, the wage rate to be paid and the availability of each position to Claimant. Thus, I find that Ms. Seyler's surveys do, indeed, address Claimant's employability within the appropriate job market.

If the employer establishes suitable alternative employment,

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[12] For the same reasons I found the 1997 flow meter repair mechanic position to be unsuitable, I so find the 1999 flow meter repair mechanic position to not constitute suitable alternative employment.

the employee can nevertheless prevail in his quest to establish total disability if he demonstrates he diligently tried and was unable to secure employment. Hairston v. Todd Pacific Shipyards Corp., 849 F.2d 1194 (9th Cir. 1998); Fox v. West State, Inc., 31 BRBS 118 (1997); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988).

In the present matter, Employer established suitable alternative employment on January 22, 1997 and thus, the burden shifts to Claimant to prove that he reasonably and diligently attempted to secure some type of suitable alternative employment within the compass of opportunities shown by Employer to be reasonably attainable and available and must establish a willingness to work. Turner, supra; see also Palumbo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). If a claimant demonstrates he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Co. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986). Finally, the claimant must reasonably cooperate with the employer's rehabilitation specialist and submit to rehabilitation evaluations. Vogle v. Sealand Terminal, 17 BRBS 126, 128 (1985).

In the present case, I find that Claimant has not established he has been diligent and/or reasonable in his attempts to return to work after the 1996 injury.

Claimant testified that he has not returned to work since the 1996 injury. (Tr. 132, 139). He also testified that he never contacted the Department of Labor vocational department concerning a request for job placement. (Tr. 133). Furthermore, Ms. Seyler provided Claimant with a vocational test and asked him to complete and return it if he was interested in returning to work, but she never received a completed form from him. (Tr. 176).

Based on the limited record evidence, I find that Claimant did not engage in a diligent and reasonable search for alternative employment and thus does not prevail in his quest to establish a case of total disability.

E. Authorization to treat with Dr. Hamsa and authorization for cervical surgery

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. In order for Employer to be liable for Claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for

compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for Claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

Additionally, the claimant has the right to choose an attending physician authorized by the Secretary to provide the required medical care. The Secretary is required to actively supervise the medical care provided and to receive periodic reports about it. The Secretary, through the District Director, has the authority to determine the necessity, character and sufficiency of present and future medical care, and may order a change of physicians or hospitals if the Secretary deems it desirable or necessary to the claimant's interest, either on the Director's own initiative, or at the employer's request.

Under Section 7(b) and (c), the employer bears the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the Act. Roger's Terminal, supra. Additionally, the employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. Slattery Assocs. v. Lloyd, 725 F.2d 780, 787 (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657, 664 (1982). Moreover, an employee cannot receive reimbursement for medical expenses under Section 7(d)(1) unless he has first requested authorization, **prior to obtaining treatment**, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982).

In the present matter, Claimant is seeking payment of medical expenses for treatment rendered by Dr. Hamsa. It should be noted that Dr. Hamsa was not Employer's choice of physician, nor was Claimant referred to him by another treating and authorized physician. Rather, Claimant sought treatment from Dr. Hamsa on his own accord and without any authorization from Employer.

Current jurisprudence does not demonstrate that retroactive authorization can occur, but rather requires authorization for medical treatment to occur **before** seeking treatment from a physician, except in cases of emergency or refusal/neglect. In the present case, Claimant chose treatment by Dr. Hamsa on his own accord. Drs. Steiner, Johnston, Corales and Bartholomew had previously treated Claimant for his work-related injuries and such treatment was authorized and paid for by Employer. The facts in

this case do not indicate that at the time Claimant sought treatment from Dr. Hamsa that such treatment was on an emergency basis, since he was concurrently treating with other physicians. Moreover, at no time prior to beginning treatment with Dr. Hamsa did Employer refuse or neglect to provide medical treatment. In fact, Claimant was receiving concurrent medical treatment from Dr. Steiner which was being paid for by Employer at the same time he was treating with Dr. Hamsa.

Therefore, based upon the facts presented and in light of the foregoing jurisprudence, I conclude that Employer is not liable for the medical treatment rendered to Claimant by Dr. Hamsa because Claimant failed to receive proper authorization for such treatment from Employer or the Department of Labor before being treated by Dr. Hamsa.

With respect to the authorization for cervical surgery, since I previously found Claimant's cervical condition to be unrelated to his work accidents of April 27, 1994 and March 1, 1996, I find Employer is not liable for cervical surgery expenses. Alternatively, Drs. Steiner, Johnston and Corales opined that Claimant is not a candidate for cervical surgery. Drs. Hamsa and Bartholomew believe Claimant is an ideal candidate for a diskectomy and fusion. Given Drs. Steiner, Corales and Johnston's exceptional qualifications as an orthopaedic surgeon and neurosurgeons, I find their opinions more persuasive and well-reasoned than Drs. Hamsa and Bartholomew's opinion in establishing that cervical surgery is unnecessary and inappropriate. Consequently, I find that Employer is not liable for cervical surgery expenses.

F. Section 8(f) Relief

Employer/Carrier contend that they are entitled to Section 8(f) relief with respect to both the April 27, 1994 and March 1, 1996 injuries because Claimant's current disabled condition is a combined result of an earlier shoulder condition and the 1994 work injury, respectively.

The District Director filed a post-hearing brief urging denial of Section 8(f) relief in favor of Employer/Carrier. It is contended that Employer/Carrier have failed to established that Claimant's current permanent partial disability, resulting from the March 1, 1996 work injury, is materially and substantially greater than that which would have resulted from the 1994 injury alone.

Section 8(f) of the Act provides in pertinent part:

(f) Injury increasing disability: (1) In any case

> in which an employee having an existing permanent partial disability suffers [an] injury...of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments...the employee...shall be paid the remainder of the compensation that would be due out of the special fund established in Section 44...

33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill, Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the current disability is not due solely to the employment-related injury. 33 U.S.C. § 908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982); C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In permanent partial disability cases, an additional requirement must be shown, i.e., that Claimant's disability is **materially and substantially greater than that which would have resulted from the new injury alone**. 33 U.S.C. § 908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment-related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f) relief,

and the aggravation will be treated as a second injury in such cases. Strachan Shipping Co. v. Nash, 782 F.2d 513, 516 (5th Cir. 1986) (en banc).

Section 8(f) is to liberally applied in favor of the employer. Maryland Shipbuilding & Dry Dock Co. v. Director, OWCP, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980). The reason for this liberal application for Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C & P Telephone Co., supra. "Disability" includes physically disabled conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accidents and compensation liability. Campbell Industries, Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192 (5th Cir. 1977).

1. Pre-existing permanent partial disability

a. The 1994 Injury

I find that the medical evidence of record does not establish that Claimant suffered a pre-existing permanent partial disability before his 1994 injury. Although the medical evidence indicates that Claimant sustained a prior rotator cuff tear in April 1985, there is no evidence that he suffered any residual disability as a result of the condition. (EX-9, p. 1). As a result of the 1985 injury, Claimant underwent a acromioplasty and rotator cuff repair. (EX-9, p. 10). Following the procedure, Claimant recovered completely and did not experience any complications. (EX-9, p. 44). The treating physician noted that Claimant should engage in only limited activity and keep his arm in a sling at all times. Id. Claimant attended a physical therapy program following surgery through February 20, 1986. (EX-9, pp. 47-59). The physical therapy notes indicate that Claimant's condition improved. Id. Claimant testified that **he recovered completely from the 1985 injury and returned to work with no restrictions whatsoever**.

It should be noted that Dr. Steiner opined that many patients who have undergone rotator cuff acromioplasty, such as Claimant did in 1985, have residual problems, such as weakness, stiffness, limitation of motion, popping and grinding in the rotator cuff.

(EX-15a, pp. 7-8). However, the record is totally devoid of any evidence that Claimant complained of such symptomatology from 1985 until the 1994 injury. Rather, Claimant worked regular duty work with no physical restrictions until he sustained another injury to his right shoulder in 1990. The 1990 injury was treated by Dr. Tamimie, who eventually released Claimant to return to regular duty work with no restrictions on May 14, 1990 and **no residual problems were noted**.

In light of the foregoing, I find and conclude that Employer has not established that Claimant suffered a pre-existing permanent partial disability to his right shoulder before his 1994 injury. Although the medical evidence establishes that Claimant sustained a prior injury, which did not result in any residual disability precluding or limiting Claimant from engaging in a full range of physical capabilities. Since Employer has not met the first requirement for Section 8(f) relief with respect to the 1994 injury, the request is **DENIED.** Thus, a determination of whether Employer met the second and third requisites for Section 8(f) relief for the 1994 injury is moot and need not be addressed in this Decision and Order.

b. The 1996 Injury

With respect to the 1996 shoulder injury, the medical evidence of record clearly establishes that Claimant injured his right shoulder in 1994 and suffered a resultant permanent partial disability, which was present prior to the March 1, 1996 work injury. The evidence indicated that Claimant suffered from a torn rotator cuff to his right shoulder in 1994. (EX-15a, p. 12; EX-11, p. 3). Claimant underwent a rotator cuff surgery on August 11, 1994 to repair the right shoulder. (EX-11, p. 5). Additionally, Dr. Steiner assigned Claimant a 10% impairment rating and restricted him from using the right upper extremity in any overhead reaching and heavy lifting activities. (EX-11, p. 17). On March 6, 1995, Dr. Steiner opined Claimant reached maximum medical improvement with respect to the right shoulder condition. Id.

In view of Claimant's history of right shoulder problems and the persuasive and sound medical diagnosis of Dr. Steiner, it is clear that Claimant's condition constituted a pre-existing permanent disability. Thus, in light of the foregoing, I find and conclude that Employer has established that Claimant suffered a pre-existing permanent partial disability. Accordingly, Employer/Carrier have established the first requirement for Section 8(f) relief.

2. Manifestation to Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Eymard & Sons Shipyards v. Smith, 862 F.2d 1220 (5th Cir. 1989); Equitable Equipment Co., supra.

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of the injury. Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. C.G. Willis, Inc. v. Director, OWCP, 31 F.3d 1112, 28 BRBS 84 (CRT) (1994) (11th Cir. 1994); Eymard & Sons, supra. There is no requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., supra.

A review of the medical records that pre-date Claimant's March 1, 1996 work injury reveals Claimant had been diagnosed with and treated for prior shoulder conditions, including two torn rotator cuffs to his right shoulder, which were the result of the 1985 and 1994 accidents, respectively. The medical records are replete with evidence establishing the existence of Claimant's prior shoulder conditions. Thus, I find that the medical evidence of record, establishing Claimant's pre-existing permanent condition to his right shoulder, were available and manifest to Employer/Carrier at the time of the March 1, 1996 work accident and injury. Accordingly, Employer/Carrier have met the second requirement necessary to establish entitlement to Section 8(f) relief for the 1996 injury.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer/Carrier of liability unless it can be shown that an employee's permanent disability was not due solely to the most recent work-related injury. Two "R" Drilling Co., supra. An employer must set forth evidence to show that claimant's pre-existing permanent disability combines with or contributes to claimant's current injury resulting

in a greater degree of permanent partial or total disability. Id. If claimant's permanent disability is a result of his work injury alone, Section 8(f) does not apply. Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980); C & P Telephone Co., supra. Moreover, Section 8(f) does not apply when claimant's permanent disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314 (11th Cir. 1988).

The fact finder's inquiry must "of necessity be resolved by inferences based on such factors as the perceived severity of the pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them." Ceres Marine Terminal v. Director, OWCP, 118 F.3d 387, 391 (5th Cir. 1997). Additionally, the burden of establishing contribution or combination and resulting disability which is materially and substantially greater rests with Employer/Carrier.

With respect to Claimant's left shoulder condition in the present matter, I find the medical evidence of record supports a conclusion that Claimant's current permanent disability is **not** due solely to his March 1, 1996 work-related injury. Claimant's treating physicians, Drs. Steiner and Hamsa, recognized Claimant suffered from a pre-existing shoulder condition. Following the first injury, Dr. Steiner assigned 10% impairment rating to Claimant's right upper extremity as a result of his condition and restricted him from any overhead reaching and heavy lifting with the right upper extremity alone. **Following the 1996 injury, Dr. Steiner permanently restricted Claimant from overhead reaching and heavy lifting with both extremities**. Although no physician expressly opined that Claimant's present disability is materially and substantially greater than if he had suffered from the 1996 injury only, it is clear by Dr. Steiner's assignment of physical restrictions that Claimant's 1994 physical restrictions combined with Claimant's current physical restrictions resulting in a greater degree of permanent partial disability with respect to his upper extremities. It should be noted that no other physician disputes Dr. Steiner's medical opinion and physical restrictions assigned to Claimant.

In light of the foregoing, I find that based on Dr. Steiner's well-reasoned, persuasive and sound medical opinion, Claimant's current disability is **not** due solely to the March 1, 1996 injury, but rather, is a combination of the pre-existing right shoulder condition from which he suffered and the injury resulting from the most recent work-related accident. In light of the additional physical restrictions assigned following the second work injury, I further find that Claimant's pre-existing shoulder condition

materially and substantially affected his current condition and resulted in a greater degree of permanent disability. Therefore, Employer/Carrier have established the third requirement necessary for entitlement to Section 8(f) relief.

It should be noted that in light of the foregoing medical evidence of record, I find the District Director's argument unpersuasive and therefore, do not accord any probative weight to it.[13] Accordingly, Employer/Carrier's request for Section 8(f) relief is hereby **GRANTED**.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with

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[13] The District Director relies on Dr. Hamsa's opinion that Claimant's physical restrictions were the same before and after the 1996 work injury: that he be restricted from overhead reaching and heavy lifting. However, this argument is without merit. The medical evidence of record clearly shows that Dr. Steiner restricted Claimant **after the 1994 accident** from overhead reaching and heavy lifting with **the right upper extremity only**. It was not until **after the 1996 accident** that Claimant was restricted from overhead reaching and heavy lifting **with both upper extremities**. This clearly creates a substantially and materially greater disability than would have resulted from the first or second work injury alone.

the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

The 1994 Injury

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from April 27, 1994 to March 6, 1995, based on Claimant's average weekly wage of $573.55, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from March 7, 1995 to March 1, 1996 based on Claimant’s average weekly wage of $573.55, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier’s request for Section 8(f) relief is hereby **DENIED**.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 27, 1994 work injury, excluding cervical medical treatment and expenses, as explicated above, pursuant to the provisions of Section 7 of the Act.

5. Employer shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982);

Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

The 1996 Injury

8. Employer/Carrier shall pay Claimant compensation for temporary total disability from March 2, 1996 to September 17, 1996, based on Claimant's average weekly wage of $606.92, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

9. Employer/Carrier shall pay Claimant compensation for permanent total disability from September 18, 1996 to January 22, 1997 based on Claimant's average weekly wage of $606.92, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

10. Employer/Carrier shall pay Claimant compensation for permanent partial disability from January 23, 1997 and continuing, based on the difference between Claimant's average weekly wage of $606.92 and his reduced weekly earning capacity of $264.40 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

11. Employer/Carrier's request for Section 8(f) relief is hereby **GRANTED**. After cessation of payments by Employer/Carrier, continuing benefits shall be paid pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further notice.

12. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's March 1, 1996 work injury, excluding cervical medical treatment and expenses, as explicated above, pursuant to the provisions of Section 7 of the Act.

13. Employer shall receive credit for all compensation heretofore paid, as and when paid.

14. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

15. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 15th day of June, 2000, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge